

1 THE COURT: All right, folks, Ms. Marsh, the juror
2 who sits about four in there was sick last night. She came in
3 and tried to give it a go. She's sick now. She wants to go
4 home, and we have two choices; stop and see what happens or
5 excuse her. My vote is to excuse her. Do you know the one I'm
6 talking about? The lady in the front row, has sort of short
7 hair, and -- I think.

8 MR. McDONALD: Dark hair.

9 THE COURT: Yeah, short and dark.

10 MR. MERRITT: This lady at the far end?

11 THE CLERK: Like three or four in.

12 THE COURT: She's number -- you don't have all day.
13 This woman is sick. She's number 37.

14 MR. ROBERTSON: Your Honor, the plaintiff agrees with
15 the Court.

16 THE COURT: Okay. That will bring the jury to eight.
17 We've got nine. That's why I got nine. There are no
18 alternates in the civil system.

19 MR. McDONALD: We would agree, Your Honor. She can
20 be excused.

21 THE COURT: Would you tell her to go with our
22 gratitude, and I will call her and thank her personally. She
23 doesn't need to come in here. She needs to go on home. Bring
24 the rest in and pray that it hasn't spread.

25 I don't know that we ever got the spelling of your

1 last name. It's H-i-l-l-i-a-r-d?

2 THE WITNESS: That's correct. I hope my testimony
3 didn't worsen her illness, Your Honor.

4 THE COURT: Well, all I can say, sir, is if it
5 worsened it, it was really because of the apprehension because
6 she knew you were coming because she got sick last night. So I
7 don't think you had anything to do with it.

8

9 (Jury in.)

10

11 THE COURT: All right. Mr. McDonald, when you're
12 ready.

13 MR. McDONALD: Thank you, Your Honor.

14

15 CROSS-EXAMINATION

16 BY MR. McDONALD:

17 Q Good afternoon, Mr. Hilliard.

18 A Good afternoon.

19 Q How much have you been paid to do your work in this case?

20 A I'm billing this case at \$450 an hour.

21 Q How much money has that added up to for this case?

22 THE COURT: So far you meant?

23 A I honestly don't know, Mr. McDonald. I haven't added it
24 up.

25 Q Can you give me an estimate?

1 A I believe I gave your associate an estimate during the
2 deposition, and I think I said I put in maybe a hundred hours
3 by that point in time, and I may have done another hundred by
4 now, but I really have not looked at it. I can't give you a
5 good estimate. I'm sorry.

6 Q Do you send itemized bills for your time?

7 A I do.

8 Q So is your best estimate then for this case about
9 200 hours now?

10 A That's the best I can do off the top of my head.

11 Q That would be about \$90,000; is that right?

12 A About.

13 Q How much did you get paid for your work on the SAP case?

14 A That was probably a bit more because I attended the trial,
15 much of the trial, so I spent more time, and there were more
16 issues. So that was probably a bit more.

17 Q How much more?

18 A There was five years ago, sir. I can't really tell you.

19 Q Was it over \$100,000; is that fair?

20 A I believe so, yes.

21 Q And you have done some other work for ePlus relating to
22 these patents; right?

23 A Yes, I have.

24 Q How much more did you charge for that work?

25 A Oh, probably another 30 or 50 hours.

1 Q So that would be about another \$25,000 or so?

2 A Yes. Over the course of five years.

3 Q I'd like to go back to your background for a moment. You
4 mentioned in the 1980s you had done some work in connection
5 with computer procurement system; is that right?

6 A Yes.

7 Q Can you tell us what type of work you did on procurement
8 systems in the 1980s?

9 A Certainly. During the 1980s, I formed my company,
10 Business Automation Associates in 1980, so during that period
11 of time, I had approximately a hundred, give or take, clients
12 where I helped them select either new or upgraded computer
13 systems for their business applications.

14 A large portion of those clients were either distribution
15 companies or manufacturers, but there were others as well, and
16 in nearly every case, the procurement activities, the
17 purchasing and procurement was a significant portion of the
18 requirements that they were looking for the systems to fulfill.

19 So I probably, over the course of that period of time,
20 looked at a hundred or more different computer systems and
21 evaluated the procurement functionality as well as other
22 functionality that was of interest to my clients.

23 Q Did those systems have the capability of searching
24 databases for items?

25 A They have the ability of searching databases for items.

1 Not in the way that's described in the patents-in-suit.

2 Q You are adding a little more to my question.

3 A I'm sorry. I was intending to qualify that with a further
4 explanation.

5 Q I'm just asking, did your work in the '80s on procurement
6 systems, that could search for items?

7 A Many of the systems had the ability to search -- to enter
8 criteria and search for items that met those criteria, yeah.

9 Q That was for the purpose of purchasing the products,
10 finding a product to purchase; correct?

11 A No. In most cases, that was for the development of a
12 sales order for selling their own products. Most of them did
13 not have that capability in the procurement area for searching
14 for products to buy. It was searching among their own database
15 of products that they sold.

16 Q So did you, in the '80s, work on any systems that were
17 computerized systems to help one of your clients buy things?

18 A Almost all of the systems had purchasing capability, but
19 they didn't have the ability to search for the items to buy.

20 Q Did you work on any systems in the '80s that could search
21 for items to buy?

22 A There may have been a few, but I don't recall off the top
23 of my head.

24 Q Now, for purposes of your analysis for this case, you used
25 the perspective of one of ordinary skill as you described it

1 earlier; correct?

2 A Yes.

3 Q That would be someone with a computer science type of
4 degree and one or two years of experience; correct?

5 A Yes.

6 Q And so when you reviewed the documents in the case, did
7 you review them from that standpoint?

8 A Yes.

9 Q Can we turn to the TV/2 brochure, Defendant's Exhibit 107.
10 This is one of the documents you reviewed --

11 THE COURT: Excuse me. My machine is going crazy.
12 Does everybody else have a good machine?

13 THE CLERK: Hit the screen one time and see --

14 THE COURT: I'm going to hit it real hard in a
15 minute.

16 THE CLERK: We had problems during the recess, but we
17 straightened them out.

18
19 (Discussion off the record.)

20
21 THE COURT: As long the jury -- you are okay? I'll
22 do without, and you go ahead, and --

23 THE CLERK: Do you want me to get IT up here now?

24 Q Do you see there the first page of that Technical Viewer/2
25 brochure?

1 A Yes.

2 Q If I understood your testimony today, you were saying that
3 the TV/2 system didn't have catalogs; is that right?

4 A There were no catalogs delivered as part of the TV/2
5 system or promoted as being delivered as part of it. That's my
6 understanding, yes.

7 Q If we go to the second page of this brochure, see if we
8 can blow up that picture near the bottom of the page. It's got
9 a picture of the TV/2 system on a computer here; is that your
10 understanding?

11 A Yes.

12 Q And there's a CD to the left of the computer in the
13 picture; is that right?

14 A Yes.

15 Q That's the CD that would have catalogs and technical
16 manuals and things like that; is that your understanding?

17 A That's my understanding, that it's an exemplary CD that
18 could contain information that the TV/2 system could view and
19 search.

20 Q So you would agree that one of ordinary skill in the art
21 would understand from reviewing these materials that the point
22 of the system, even though it might be sold without the
23 catalogs loaded on them, is you'd get a CD or catalog data on a
24 computer and load it into the system; right?

25 A Well, this also shows that there is a computer there, and

1 the brochure clearly states that it doesn't come with a
2 computer, that there's a prerequisite that the buyer has to
3 have, so it's a piece of software. It's not a CD or a
4 computer, it's a piece of software, and that certainly
5 indicates and it indicates in the brochure that it's used to
6 read data that can be input into it through a CD, yes.

7 Q So you would agree that this brochure does teach or
8 suggest to that person with the computer science degree and a
9 couple of years of experience that you take that TV/2 software,
10 load it on a computer, and put a catalog on a CD into the
11 system? That would at least be one way to use it; right?

12 A It says that's one of the possibilities, yes.

13 Q So your testimony about TV/2 not having catalogs, you are
14 just saying when you buy the system from IBM, it's not going to
15 come with your own personal catalogs that you would select to
16 load on; right?

17 A That's what I'm saying, yes.

18 Q Okay. But you do understand that the materials regarding
19 the TV/2 system would teach or suggest to one of ordinary skill
20 in the art that they could use that system with one or two or
21 more CDs of catalogs depending on what their needs are; right?

22 A This is an undated brochure, number one. We don't know
23 when it was published. Number two, it certainly indicates that
24 it has that capability, but we know that it didn't have the
25 capability of doing the catalogs that were necessary for the

1 electronic sourcing system because that was the subject of a
2 contract between IBM and Fisher to develop that.

3 Q Well, please listen to my questions and just answer my
4 questions. Your lawyer will have a chance to ask you some more
5 questions and clarify things if necessary, but I just want to
6 see if we at least agree on one thing which is that one of
7 ordinary skill, seeing these TV/2 materials, would understand
8 that the TV/2 system could be used with multiple electronic
9 catalogs?

10 A It says in the brochure, whenever this brochure came out
11 in whatever version it refers to, that that's one of the
12 possibilities that it could be adapted to do, yes, and that's
13 my understanding.

14 Q Did you use that understanding in your analysis?

15 A Yes.

16 Q You do agree that the TV/2 system is prior art to the
17 patents-in-suit?

18 A What TV/2 system?

19 MS. ALBERT: Calls for a legal conclusion. I don't
20 know that he's competent to say what is prior art or not.

21 THE COURT: You can ask him what he considered as
22 prior art. Whether it is or isn't is a matter the jury will be
23 instructed on as a matter of law.

24 MR. McDONALD: Can we go to Mr. Hilliard's slide
25 number four, please.

1 Q This is one of the slides you prepared for your testimony;
2 right, Mr. Hilliard?

3 A Yes.

4 Q The heading on your slide is prior art system, TV/2;
5 right?

6 A Yes.

7 Q You considered the TV/2 system to be a prior art system;
8 right?

9 A Well, I probably should have titled that claimed or
10 alleged prior art systems. It was my understanding that it was
11 Lawson's contention that TV/2 was prior art, so I was dealing
12 with that. I didn't put the full title.

13 Q You haven't been shy about disagreeing with Lawson's
14 contentions where you thought that was appropriate, have you?

15 A No, sir.

16 Q So this slide, you created this slide, and you chose to
17 label it prior art systems TV/2 yourself; right?

18 A I told you what I meant by that, but, yes.

19 Q Let me just understand, though. Are you disagreeing that
20 the system -- if we can be specific, the system as described in
21 the TV/2 brochure, Defendant's Exhibit 107, that describes as
22 prior art TV/2 system?

23 MS. ALBERT: Asked and answered and calls for a legal
24 conclusion.

25 MR. McDONALD: Clarify what he's taking about.

1 THE COURT: Can you just ask him the question of
2 whether he considered this as prior art. Whether it is or is
3 not is a matter that the jury will be instructed on. They then
4 will determine it. The issue is whether he considered it to be
5 prior art as of whatever time you are talking about.

6 Q Mr. Hilliard, did you consider the TV/2 system as
7 described in the brochure, Defendant's Exhibit 107, to be prior
8 art?

9 A Exhibit 107 has no date, so I can't -- I don't know
10 whether Exhibit 107 would be considered prior art or not from
11 that standpoint, and I don't know whether what's described in
12 the brochure -- in the general terms, it's described as what
13 TV/2 actually did or what the brochure was intending to portray
14 it could do.

15 Brochures, as one of -- from the point of view of one of
16 ordinary skill in the art, one knows that brochures often
17 describe not only existing capabilities but future capabilities
18 of products, so the combination of this being a marketing
19 product brief, is what I would call it, and not knowing its
20 date, I can't say. I had to look at it and analyze whether if
21 it were prior art, whether it would anticipate the claims, but
22 I can't say what it is or isn't.

23 Q For purposes of your analysis, you did not personally make
24 a conclusion one way or the other as to whether the system
25 described in the brochure, Defendant's Exhibit 107, was prior

1 art? Yes or no?

2 A Whether the system described in the brochure -- the
3 description is so vague and uncertain that I couldn't make that
4 determination.

5 THE COURT: I think he said he assumed for the
6 purposes of his analysis that it was prior art because he had
7 to address that question, but he made no judgment whether, in
8 fact, it was. Is that what you are saying?

9 THE WITNESS: Yes, sir. Yes, Your Honor.

10 Q If we can turn to slide number two of Mr. Hilliard's
11 slides. This is another slide you prepared; right, Mr.
12 Hilliard?

13 A Yes.

14 Q This one is entitled prior art systems RIMS; correct?

15 A Yes.

16 Q For purposes of your analysis, did you assume the RIMS
17 system, as depicted in the '989 RIMS patent, is prior art?

18 A I assumed that the RIMS system as described in the '989
19 patent was of -- I don't know that I'm able to make the legal
20 judgment, but I assumed that it was available since it was
21 disclosed and referenced in the patents, that it was prior and
22 that it was as described in the '989.

23 Q You understand also that one form that something can be
24 prior art is if it's on sale more than one year before the
25 filing date on the patent?

1 A I understand that, yes.

2 Q Did you do -- did you provide any testimony about whether
3 or not either the RIMS system or the TV/2 system was on sale
4 more than one year before the filing date on the
5 patents-in-suit?

6 A I found -- I looked for evidence of it having been on sale
7 one year before, or even one day before, and I found no
8 evidence that either system had ever been sold and delivered
9 prior to the date of the patent.

10 Q So you don't have personal knowledge, though, as to
11 whether or not those RIMS systems or TV/2 systems were on sale
12 back in the early '90s; correct?

13 A Well, let me address them one at a time. With regard to
14 the RIMS system, my understanding is that it was not on sale,
15 that it was a tool --

16 Q Please understand my question. I'm asking your own
17 personal knowledge. Were you there, in other words. You
18 weren't there at the time back in that '92/'93 period where,
19 from a first person standpoint, you could tell us one way or
20 the other whether the RIMS system was on sale; right?

21 MS. ALBERT: Your Honor, vague and ambiguous as to
22 which RIMS system is being referenced here. I think the record
23 evidence is that the system changed over time, and I don't know
24 that this question is tethered to any particular system or the
25 system described in the patent.

1 MR. McDONALD: I tried to zero in on a time frame,
2 Your Honor, and I think the answer should eliminate the need to
3 go through any details about that.

4 THE COURT: I'm not sure I quite understand what you
5 are saying in response, but I believe the objection is
6 well-taken to the form of the question. So can you reformulate
7 it?

8 Q Mr. Hilliard --

9 THE COURT: By putting some time into it, I think was
10 the principal objection.

11 Q So go to the time frame prior to August of '93, Mr.
12 Hilliard.

13 A Yes, sir.

14 Q Did you have any role in selling any version of the
15 Fishers RIMS systems?

16 A No.

17 Q Do you have any personal knowledge from a first person
18 standpoint of any sales activities involving any sort of RIMS
19 systems prior to August of '93?

20 A No, I don't have any firsthand knowledge.

21 Q Do you have any firsthand or personal knowledge about any
22 sales activities regarding the TV/2 system prior to August of
23 '93?

24 A Well, are you asking was I involved in that or was I
25 involved in any transaction, where it was sold?

1 Q Personal involvement in something.

2 A No.

3 Q Now, can we turn to Defendant's Exhibit 62, please. Now,
4 as part of your work in this case, Mr. Hilliard, did you review
5 a trademark application by Fisher Scientific Company for the
6 Fisher RIMS trademark?

7 A I may have. I don't recall it specifically.

8 Q Can we turn to the fifth page of this document, please.
9 Can you blow up the text in the main body of that?

10 A I have seen this document.

11 Q Now that you've seen more, it refreshes your memory?

12 A Yes.

13 Q So this is the file relating to Fisher Scientific's
14 application to get a federal trademark registration for the
15 Fisher RIMS trademark; correct?

16 A I believe so, yes.

17 Q You can see on the screen right now there's a date stamp
18 indicating this document here on the screen was filed
19 April 30th, 1993; correct?

20 A Yes.

21 Q And then there's a description of the services there. Do
22 you see in the indented paragraph where it starts with the
23 words, computer-based services for processing requisitions,
24 entering purchase orders, maintaining inventory records,
25 transferring related reports and data to other computers, and

1 generating documents for picking, packing, shipping, and
2 receiving requisitioned and ordered products? Do you see that
3 language?

4 A Yes.

5 Q Do you think that is a fair summary of what the RIMS
6 system did, as you understand it, back in the time frame before
7 April of '93?

8 A That's a characterization of what it was purported to do,
9 although I don't know that -- the inventors' deposition
10 testimony would contradict -- in terms of what it actually did,
11 would contradict some of that.

12 Q Can we scroll down on the page here, please. Do you see
13 that bottom paragraph here where it indicates the service mark?
14 That's the Fisher RIMS mark; right, Mr. Hilliard?

15 A Yes.

16 Q Says was first used with respect to the services at least
17 as early as August 1992, and was first used with respect to the
18 services in interstate commerce at least as early as
19 August 1992, and is now in use in such commerce. Do you see
20 that language?

21 A Yes.

22 Q You don't have any reason to dispute those statements, do
23 you?

24 A No.

25 MR. ALBERT: Objection. Go ahead.

1 Q You have an understanding that use in commerce, that would
2 be use trying to sell products using the trademark; correct?

3 MS. ALBERT: Objection, Your Honor, relevance.

4 There's no way to tie DX-62 to any system described in the '989
5 patent. We don't even know which specific version of the RIMS
6 system is referenced in this exhibit or if it's at all related
7 to the system described in the RIMS patent that's at issue.

8 MR. McDONALD: I think I'm entitled to an answer to
9 the question, Your Honor, but I will be more specific about
10 what's in this file and which RIMS system it was. I can't get
11 all the answers in one question.

12 THE COURT: Overruled.

13 Q So you don't have any reason to dispute that the Fisher
14 RIMS system was in commerce in August of 1992; right,
15 Mr. Hilliard?

16 A I don't have any reason to dispute that there was a system
17 that went by that name that was as described in this statement.

18 Q If we go to the next sentence here after the highlighting,
19 it says there, quote, the mark is used in literature and
20 presentation materials for the services and three specimens
21 showing the mark as actually used are presented herewith; do
22 you see that?

23 A Yes.

24 Q Do you recall seeing an actual specimen or example of that
25 mark in use in that trademark file history that you reviewed?

1 A I believe so, yes.

2 Q That was a brochure for the Fisher RIMS system; correct?

3 A Yes, I recall seeing the brochure for the Fisher RIMS
4 system.

5 Q Can we turn to, I think it's page 32 of this exhibit. Is
6 that the cover page for that brochure, Mr. Hilliard?

7 A Yes.

8 Q Did you review this brochure as part of your work in this
9 case?

10 A Yes.

11 Q If we go to the second page of this, this is for the
12 Fisher RIMS system as you understand it; correct?

13 MS. ALBERT: Your Honor, I object to the form. The
14 question is untethered to any particular version of the RIMS
15 system or any particular time frame.

16 THE COURT: I think considering the issue, it needs a
17 time limit. Sustained.

18 Q Your understanding is this was a brochure submitted to the
19 Patent and Trademark Office in connection with the trademark
20 application by April of 1993; correct?

21 A That's my understanding, that this brochure was submitted,
22 yes. That's my understanding.

23 Q And you understand it was a document authored by Fisher
24 Scientific?

25 A Yes, that's my understanding as well.

1 Q All right. So with respect to this brochure in existence
2 by April of 1993, go to the second page of this document. Do
3 you see there some description of features of the Fisher RIMS
4 system?

5 A Yes, I looked at the features that are listed there.

6 Q If we look at the very first bullet point on the left
7 side, it says, consolidates all prior activity including
8 third-party and administrative purchases; do you see that?

9 A Yes, I see that it says that, yes.

10 Q What was your understanding of what that means when you
11 reviewed this?

12 A I looked at this as a marketing brochure that described
13 intended potential functions for something called Fisher RIMS
14 which may or may not have performed some of the functions
15 described in the '989 patent.

16 So looking at it from the standpoint of one of ordinary
17 skill in the art, I would understand this to be a sales claim
18 that some system that may conform to some description -- to
19 some unspecified description will have or is intended to have
20 this capability at some point in time. And it says
21 consolidates all supplier activity. That could include just
22 reporting on that activity rather than having anything to do
23 with acquiring products in that activity.

24 Q What is your understanding as to what the term third party
25 means in this bullet point?

1 A Third party would be parties other than Fisher.

2 Q Would those mean third parties that provide products?

3 A Conceivably.

4 Q That's what it means? That's your understanding as to
5 what it means; right, Mr. Farber?

6 A I understand that's what it's claiming that the -- some
7 RIMS system might be able to do, yes.

8 Q And that's basically third-party sources; right?

9 A Yes.

10 Q If we go to the right side of this page of the brochure,
11 can you highlight the inventory control features? Do you see
12 the third bullet point there, Mr. Hilliard? Where it says,
13 cross-references your stock numbers and all supplier numbers,
14 do you see that?

15 A Yes.

16 Q Now, this is a brochure. The intended audience for this
17 brochure would be a Fisher customer; correct?

18 A That's my understanding, yes.

19 Q So this would be the customer who buys products; right?

20 A Yes.

21 Q Is it your understanding that the Fisher RIMS system was
22 intended to benefit buyers of products?

23 A No.

24 Q Why would they have a brochure touting Fisher RIMS system
25 to people who buy products unless the Fisher RIMS was intended

1 to benefit people who buy products?

2 A It was intended primarily to benefit Fisher because it was
3 a Fisher system. If you look in the '989 patent, for example,
4 and this doesn't necessarily -- what's described here doesn't
5 necessarily conform to the '989 patent according to the
6 inventors, but if you look at the '989 patent, there is a
7 section on cross-referencing, and it basically says that the
8 purpose of cross-referencing is to supply customers with Fisher
9 products even though they might give the customer service rep a
10 competing product, a competing vendor's product.

11 Q Let's stick with this brochure, Mr. Hilliard, all right?
12 Would you agree that one of ordinary skill reading this
13 brochure in this particular bullet point would understand that
14 this means that this Fisher RIMS system could cross-reference
15 the customer's stock numbers with all of that customer's
16 supplier numbers?

17 A I would understand that it means that the system was
18 claimed at some point to have that capability at some point in
19 time, yes.

20 Q So would you agree, at least in part, that the RIMS
21 system, as described in this April 1993 brochure, at least in
22 part is a buyer's system?

23 MS. ALBERT: Object to the form of the question to
24 the characterization of the brochure as being April 1993 since
25 the brochure is undated.

1 MR. McDONALD: I think I've already shown it, Your
2 Honor, from the document dated April '93, and in the official
3 trademark file history it refers specifically to a specimen of
4 use, and this is the specimen of use.

5 THE COURT: It doesn't -- it's not a dated specimen
6 of use.

7 MR. McDONALD: But it was submitted to the Trademark
8 Office with the date stamp April 30, 1993, so we know it's no
9 later than that.

10 THE COURT: Well, that's a different question.
11 Sustained.

12 Q Would you agree with me, Mr. Hilliard, that the system
13 described in this brochure that's part of the RIMS trademark
14 application describes a system that, at least in part, is for
15 the benefit of buyers?

16 A That's a different question -- you asked me before whether
17 I would agree it's a buyer's system, and I would not agree it's
18 a buyer's system. It's a seller's system. It did provide some
19 benefits to buyers of Fisher products, but it is not a buyer's
20 system which was the question that you asked me previously.

21 Q Take them one question at a time. And if we blow back up
22 to this page here, the entirety of this page two of the
23 brochure, aren't all of the features listed on this page
24 intended to communicate the benefit of the RIMS system to
25 somebody who buys products?

1 A Yes. They are intended to communicate potential benefits
2 to the buyer to allow Fisher to put this system into their
3 premise along with the Fisher customer sales rep to operate it.

4 Q Isn't it true that the features of the Fisher RIMS system
5 were developed to provide Fisher Scientific's customers with
6 flexibility and customization for requisitions, purchasing, and
7 inventory control?

8 A I wouldn't agree with that characterization, no.

9 Q Can we turn to the next page of the brochure, please. Can
10 you blow up that paragraph below the keyboard.

11 Do you see the sentence there in the brochure,
12 Mr. Hilliard where it says, the exclusive features of Fisher
13 RIMS were developed to provide Fisher Scientific's valued
14 customers with maximum flexibility and system customization for
15 requisitions, purchasing, and inventory control. Do you see
16 that?

17 A I see where it says that. That's certainly a sales claim.
18 To me, that's like saying, I'm from the IRS, I'm here to help
19 you.

20 Q This is a document from Fisher; right?

21 A Yes.

22 Q This is from the 1993 time frame; right?

23 A Yes, and they certainly would like their customers to
24 believe that, I'm quite sure.

25 Q Are you disputing what's in that statement?

1 A Pardon?

2 Q Are you disputing what's highlighted up on the screen
3 right now?

4 A I'm not disputing that the RIMS system, some RIMS system
5 could provide some benefits to buyers, but that wasn't its
6 purpose. I'm just -- and I'm -- the testimony of the inventors
7 certainly indicated to me that this was not the principal
8 reason why the features were developed. The features were
9 developed so that Fisher could sell more of its products to its
10 customers rather than having its customers buy from
11 competitors.

12 Q But would you agree that at least one purpose of the
13 system, as it existed in April of '93 as described in this
14 brochure, was to benefit customers?

15 MS. ALBERT: Asked and answered, Your Honor.

16 THE COURT: Sustained.

17 Q Let's go -- isn't it true that Fisher told its customers
18 that the people in the customers's organization could enter
19 requisitions and purchase orders using -- using the Fisher RIMS
20 system, that the customer could, in fact, enter requisitions
21 and purchase orders?

22 MS. ALBERT: Object to the form. I don't know how he
23 could know what Fisher told its customers.

24 MR. McDONALD: He's reviewed the documents in the
25 case.

1 THE COURT: You mean that document or what?

2 MR. McDONALD: I was asking the question generally to
3 start with here.

4 THE COURT: Objection sustained.

5 MR. McDONALD: Can we go another five pages into the
6 brochure here. Can we blow up the paragraph at the bottom of
7 the page.

8 Q Do you see there, Mr. Hilliard, in the paragraph that
9 begins with the word, a Fisher customer service representative?

10 A I see that.

11 Q So it talks about a Fisher customer service
12 representative; right?

13 A Yes.

14 Q Then the next sentence after that, it says, your
15 requisition or purchase order can be entered remotely by the
16 people in your organization who will be using the product, or
17 your Fisher CSR can enter it directly into the Fisher RIMS PC.
18 Either way, you'll get complete reports on every transaction;
19 do you see that?

20 A I see where it says that, but you've left out the
21 remainder of the first sentence.

22 Q We can highlight that if you'd like, but as I understand
23 this, would you agree what's being described in this April '93
24 brochure is both the customer service representative and the
25 customer's own people can use the RIMS system?

1 A I agree that it says that in the brochure, but according
2 to the inventors, it never worked that way, and certainly the
3 system described in the '989 patent doesn't work that way.

4 Q Go to the next page of the brochure, please. If you
5 highlight the column on the bottom left.

6 Now, in this section, it's referring to the color-coded
7 paths in the schematic diagram above; do you see that?

8 A Yes, I see that, yes.

9 Q And it says following that, you can get a sense of how
10 smoothly and efficiently Fisher RIMS handles purchases of
11 various types; do you see that?

12 A Yes.

13 Q It lists three types under that; correct?

14 A Yes.

15 Q One is Fisher products, one is third-party purchases
16 delivered from a Fisher warehouse, and the third is third-party
17 purchases delivered direct; do you see that?

18 A Yes.

19 Q Do you have any reason to dispute the accuracy of this
20 representation in this brochure that was provided to the
21 trademark office?

22 A I don't know what system this refers to in that there's no
23 tying this brochure to the '989 patent specifically, at least
24 according to the inventors, but if you were to look at the '989
25 patent, the '989 patent describes all three of the these

1 options, and all three of these options in the '989 patent
2 result in a sale from Fisher to the customer, no direct sales
3 from a third-party vendor to the customer regardless of whether
4 its's delivered direct on a drop shipment or delivered from a
5 warehouse.

6 In all three of those instances as described in the '989
7 patent, the sale is from Fisher to the customer. There is no
8 option in the '989 patent for a sale direct from a third party
9 to a customer. So I don't dispute that they promoted this. I
10 don't dispute that the description in the '989 patent covers
11 this, but this does not imply any vendor to the customer other
12 than Fisher. And that's described right in the description of
13 the '989.

14 Q Do you have an understanding that Fisher gets about
15 two-thirds of its products actually from other sources?

16 A I don't know what percentage, but they don't
17 manufacture -- my understanding is they don't manufacture
18 necessarily all of the products that they warehouse and sell.

19 Q So they act for some products as a middleman for other
20 sources; right?

21 A By a middleman, you mean buy and resell?

22 Q Yes.

23 A Yes, they buy and resell.

24 Q And sometimes they'll actually have the products delivered
25 directly from who they are buying from directly to the

1 customer; right?

2 A Yes, but the ones they buy from bill them for the product,
3 and then they bill the customer. So the sale goes from Fisher
4 to the customer. There is no direct sale from the third party
5 to the customer. There's only one vendor to the customer, and
6 that's Fisher.

7 Q Can you put up the Court's definition of electronic
8 sourcing system, please.

9 You have that definition up on the screen now,
10 Mr. Hilliard?

11 A Yes.

12 Q Would you agree that the Fisher RIMS system described in
13 the brochure from April of '93 that we were just going through
14 is an electronic system for use by a prospective buyer to
15 locate and find items to purchase from sources, suppliers, or
16 vendors?

17 A No.

18 Q You don't agree that the brochure, if it's an accurate
19 description, if we can accept it as accurate, that it meets
20 that description, Mr. Hilliard?

21 MS. ALBERT: Object to the form. I think
22 Mr. Hilliard already testified that he does not accept it as
23 accurate.

24 THE COURT: He's already answered the question. He
25 said, no, he doesn't.

1 MR. McDONALD: But I'd like him to at least tell me
2 whether or not he would agree that if the brochure is accurate,
3 that it meets the Court's definition of electronic sourcing
4 system. I think I'm entitled to know that.

5 MS. ALBERT: Same objection.

6 THE COURT: He already answered that. He said, no,
7 it doesn't. Assuming it's accurate, he said, no, it doesn't.

8 THE WITNESS: Even assuming it's accurate, no, it
9 doesn't.

10 THE COURT: I think he said that.

11 Q With the respect to the RIMS system as described now in
12 the '989 patent, Mr. Hilliard, I'd like to put the brochure
13 aside now and talk about the patent.

14 A Okay.

15 Q In your analysis, you took into account the Court's
16 definition of catalogs; correct?

17 A Yes.

18 Q And is it your opinion that there are no databases in the
19 RIMS system that meet the Court's definition of catalog?

20 A That's correct, because the databases in the RIMS system
21 do not have any relation to multiple vendors. The items aren't
22 related to a vendor. There's nothing in the item file that
23 indicates vendor, and there's only one vendor, not multiple.

24 Q So is it your opinion that if a given part master or item
25 master does not have an indication of who the vendor is within

1 that master, it's not a catalog?

2 A That's my understanding of the Court's construction, yes.

3 Q And your understanding is that the parts master is a list
4 of items that are kept in the customer's inventory; is that
5 right?

6 A It's a -- the part master is a list of items that are kept
7 in the inventory that Fisher manages. The inventory that
8 Fisher manages, according to the '989 patent are of five
9 different types; types one, three, four, five, and six. Some
10 of those, I think -- four of those five types -- there's a type
11 two mentioned also, but it's not used. So four of the five
12 types are owned by Fisher, and -- pardon me. Three of the five
13 types are owned by Fisher. One of the five types is owned by
14 customer, and then the fifth are items that are not -- that the
15 RIMS system is not used to acquired. I can go type by type
16 number with you if you'd like.

17 Q That's all right. Let me ask you ask it this way: Would
18 you agree that the databases in the RIMS '989 patent system
19 relate to items that are already owned by either the customer
20 or the distributor?

21 A Yes. Pardon me. There are items listed in the database
22 that may not be in stock in either customer or the
23 distributor's inventory, so it might -- at any given point in
24 time might not be owned by one or the other.

25 Q For those, would those be items the customer would want to

1 keep track of even though on a given day they might not have
2 them in inventory? Is that the sort of thing you are talking
3 about?

4 A They are items Fisher wants to keep track of in order to
5 manage their customer account.

6 Q Would you agree that the RIMS system, as described in the
7 '989 patent, has cross-reference tables?

8 A Yes.

9 Q Those cross-reference tables include information from
10 multiple vendors, don't they?

11 A Their cross-reference tables include product numbers from
12 multiple vendors.

13 Q That would be information from multiple vendors; right?

14 A They are product numbers related to multiple vendor
15 products. I guess you could say it that way.

16 Q Do you consider those cross-reference tables in the Fisher
17 '989 patent to be catalogs since they have information from
18 vendors?

19 A No. Because they don't indicate a vendor from which the
20 customer is going to purchase product, and, in fact, if you
21 look at the bottom of column 34, you'll see what those
22 cross-reference tables are used for. They're used so that the
23 Fisher customer sales rep can supply a Fisher product instead
24 of a competing vendor product.

25 Q Do you think the purpose of the table relates to whether

1 it's a catalog or not?

2 A The catalog has to refer to the vendor for whom the -- who
3 is going to sell the product to the customer.

4 Q I just want to get clarified, though. When you looked at
5 applying the Court's definition of catalog in this case, did
6 you look at the purpose of the database you were looking at as
7 an important consideration in deciding whether or not a given
8 database is a catalog?

9 A You know, I apologize for trying to answer your question
10 by giving you another reason why -- you asked me whether I
11 agreed with one reason, and I tried to explain another reason.
12 I apologize for doing that. I'm sorry.

13 What I'm saying is that the Court's construction requires
14 that the catalog information needs to be related to sources or
15 vendors from which the customer is going to buy product. In
16 this case, that other vendor information doesn't relate to
17 sources or vendors from whom the customer is going to buy
18 product. It relates to just a cross-reference to the other
19 vendor's product number.

20 THE COURT: In that answer, when you said, in this
21 case, did you mean in the '989 patent or the RIMS system, or
22 what did you mean?

23 THE WITNESS: In the RIMS system.

24 THE COURT: Okay.

25 THE WITNESS: I'm sorry, Your Honor.

1 Q The RIMS system also, as described in the '989 patent,
2 also includes a host database; correct?

3 A Yes.

4 Q That host database, what sort of item information is kept
5 in the host database in the Fisher RIMS system as described in
6 the '989 patent?

7 A Information about the items that the host distributor --
8 the distributor, which is Fisher, which owns the host computer
9 sells to its customers.

10 Q Is that a catalog as the Court construed it?

11 A No, because it -- there is only one vendor. It doesn't
12 provide information. At least as I understand it, it doesn't
13 provide information about vendors from which the customer is
14 going to buy product. The customer only buys product from
15 Fisher.

16 Q Would you agree that that host database at least includes
17 information that originates from Fisher as a vendor or
18 distributor?

19 A Yes, it includes database that originates from Fisher,
20 yes.

21 Q And includes information about products such as an item
22 number and description and things like that; right?

23 A Yes.

24 Q And it's an organized collection of data, isn't it?

25 A Yes.

1 Q But it's not a catalog; right?

2 A No.

3 Q Did ePlus ask you to do any analysis of the infringement
4 issues in this case?

5 A No.

6 Q Did you describe the systems in the patents in the suit as
7 systems that would be operated by the buyer as opposed to a
8 seller like Fisher?

9 A I'm sorry. I didn't follow your question.

10 Q I'm sorry. Maybe -- I just remember you saying something
11 about a buyer system versus a seller system when you were
12 comparing the RIMS and the patents-in-suit, so maybe we'll
13 start by, can you explain to me whether or not the systems
14 described in the patents-in-suit, did you consider those buyer
15 systems or seller systems?

16 A I would consider those buyer systems because they are
17 operated -- because they empower the buyer to select the
18 vendors from whom he or she is going to buy product.

19 Q Okay. And then the Fisher system as described in the '989
20 RIMS patent, did you consider that a seller system?

21 A I considered that a seller system because as described in
22 the '989 patent, the operator of that system is a Fisher
23 employee, the Fisher CSR.

24 Q Customer service representative; right?

25 A Yes.

1 Q So if the system has the customer service representative,
2 then you would consider that to be a buyer-focused system?

3 A If a system is operated by a CSR -- well, that wouldn't
4 necessarily be the only criteria, but certainly when you look
5 at the system as described in the '989 patent, which is
6 operated by a seller, the Fisher CSR, not by the buyer who --
7 when you look at the fact that it's operated by the seller
8 along with all the other description, it's clear that it's a --
9 the system as described in the '989 is a seller's system, not a
10 buyer's system.

11 Q Isn't it true that under your analysis, the system
12 described in the patents-in-suit would also be seller systems
13 in the preferred embodiment described in these patents?

14 A The --

15 MS. ALBERT: I'm sorry, I missed the question. Can
16 you repeat it, please?

17 Q Let me just go right to it. Can you turn to the patent
18 number '683, Exhibit 1, and column three. If you go down to
19 line 48 to 56, please, of column three. Now, we've moved away
20 from the RIMS patent now, and now we're involved in one of the
21 patents involved in the lawsuit; correct?

22 A Yes.

23 Q It's your understanding all the patents in the lawsuit
24 have essentially the same detailed description of the
25 invention; right?

1 A Very similar. It varies a bit from patent to patent.

2 Q And you see here the very first paragraph under the
3 heading detailed description of the invention?

4 A Yes.

5 Q First line says, figures 1A and 1B show preferred
6 embodiments of the electronic sourcing system five of the
7 present invention. Do you see that?

8 A Yes.

9 Q The next sentence, as shown in figure 1A, a local
10 computer, which is preferably located at or near a customer
11 SITE and the site of just-in-time, or JIT, inventory is
12 preferably used by an on-site customer service representative
13 dedicated to a customer to assist that customer in
14 requisitioning items needed. Do you see that language?

15 A I do.

16 Q So isn't it true that, at least in the preferred format of
17 the use of the system described in the patents-in-suit, they
18 would be used with the customer service representative just
19 like the RIMS system?

20 MS. ALBERT: Object to the form of the question. It
21 suggests that that's the only preferred embodiment described in
22 the patent.

23 THE COURT: I think you asked specifically about the
24 preferred embodiment.

25 MS. ALBERT: He said that was the preferred

1 embodiment. There are multiple preferred embodiments.

2 THE COURT: You mean it should be a preferred
3 embodiment.

4 MS. ALBERT: Correct, Your Honor.

5 THE COURT: Sustained.

6 Q Would you agree, Mr. Hilliard, that as shown on the
7 language up on the screen here, a preferred embodiment of the
8 system described in the patents-in-suit is to have that system
9 used by an on-site customer service representative just like
10 the RIMS system described in the '989 patent?

11 A Well, this is an introductory paragraph to quite a long
12 detailed description of the invention, and it does say that,
13 but as you go through the rest of the detailed description, it
14 gives options even in that preferred embodiment where the buyer
15 is empowered to do the catalog selection and the search and the
16 requisition building and so forth.

17 So, yes, it says that, but that doesn't characterize the
18 whole of the preferred embodiment if you go through and read
19 the entire detailed description.

20 Q Are you aware of any language in the patent which actually
21 says it's preferable to have the customer operate the system
22 themselves?

23 A I think I can find that, yes. Well, that says that's part
24 of a preferred environment, that is an option within the
25 preferred environment, yes.

1 Q I'm asking whether there's any indication that that's
2 actually a preferred way to do things.

3 A I believe I can find that in the patent, yes.

4 Q Okay. Would you go ahead and show me what you are talking
5 about.

6 THE WITNESS: May take me a moment.

7 Q How long do you think it will take you, because I'll
8 withdraw --

9 THE COURT: The answer would be about an hour and a
10 half then. You talk about rising on the bait.

11 MR. McDONALD: Threw myself a curve ball there. I'll
12 withdraw the question.

13 THE WITNESS: I don't think it would take -- a few
14 moments.

15 THE COURT: If he wants to withdraw it, he can
16 withdraw it. It's his question. He can pull it any time he
17 wants to. Do you want him to look or pull?

18 MR. McDONALD: I think we're going to go on.

19 THE COURT: Abandon your ship.

20 Q You would agree that the TV/2 system did have a way to
21 allow a user to select certain topics to search?

22 A Based on the lack of specificity of both of the brochures
23 that were produced, combined with the recollection of the two
24 IBM employees that were involved and the amount of effort on
25 IBM's part that was required to allow it to do that, no, I

1 wouldn't necessarily agree that it had that capability.

2 I would agree that it could be as was shown with over a
3 year of effort by ten IBM employees, it could be made to have
4 that capability, but I don't agree that as delivered it had
5 that capability, and certainly the brochures, the DX-105 and
6 107 aren't specific enough to corroborate that it had that
7 capability.

8 Q Can we turn to the Technical Viewer/2 general information
9 manual, DX-105, to page seven, please. Can you blow up the
10 section entitled search.

11 Do you have up on the screen now, Mr. Hilliard, a
12 description of the features of IBM Technical Viewer/2 with
13 respect to search; correct?

14 A Yes.

15 Q This indicates that TV/2 had a search facility that can
16 locate every occurrence of a word or phrase in either the
17 current topic, a list of selected topics, the complete
18 document, or another document; correct?

19 A That's what the brochure claims, yes.

20 Q Now, is it -- for purposes of your analysis, did you
21 assume that was true in the IBM system as it existed back in
22 1992 or not?

23 A I didn't find this to be convincing. I found this to be a
24 marketing -- I looked at it from the point of view of one of
25 ordinary skill in the art, and I would look at it as a

1 marketing claim, and when I combined that with the actual
2 knowledge of what happened when IBM was contracted to deliver
3 TV/2 with that capability, I didn't consider that to be
4 accurate, no.

5 Q Would you agree that the people that were working at IBM
6 in the early '90s on the TV/2 product would know more about
7 what it could do than you do?

8 A Most likely.

9 Q Would you agree that the TV/2 product, as of the 1992,
10 early 1993 time frame had the ability to create a shopping list
11 of products and pass that list to another application?

12 A I would agree that it was claimed to have that, although
13 my reading of the depositions of the IBM employees who were
14 involved in this during that time frame said that developing
15 that shopping list capability was one of the tasks that they
16 undertook as part of their contract with Fisher.

17 So it would seem to me that it didn't have that capability
18 despite the fact that it was claimed.

19 Q Do you understand that the TV/2 product had in the '92,
20 early '93 time frame something called an application program
21 interface?

22 A Yes.

23 Q What is your understanding as to what the purpose of that
24 is?

25 A Application programming interface, often called an API, is

1 a component of a system that allows it to interface to related
2 applications so that it can pass data back and forth.

3 Q Is it your understanding that part of that project that
4 Fisher asked IBM to do was to help customize the interface
5 specific to the Fisher system?

6 A Yes.

7 Q Now, in your testimony, you basically, I think you said
8 more than once the TV/2 system didn't bring anything to the
9 table; did I get that right?

10 A With respect to the elements of the claims I said that,
11 yes. I didn't say that just in general, but if you looked at
12 it in the context of the claims and the elements of the claims,
13 it didn't bring anything to the table that would enable the
14 combination to meet the claims, and, therefore, rendering a
15 combination an obvious way of meeting the claims.

16 Q When Fisher paid IBM about \$600,000 to do this work, do
17 you have an understanding as to whether IBM brought anything to
18 the table in exchange for getting that money?

19 A Well, after the 600 -- after the \$600,000, yes, but the
20 TV/2 system as it was deliverable prior to the contract with
21 Fisher, no.

22 Q What is your understanding as to what IBM actually
23 delivered with that?

24 A They delivered a revised version of TV/2 that had, after
25 ten individuals worked for over a year for, I think you said

1 \$600,000, a version of TV/2 that had interfaces to the
2 electronic sourcing system, had the ability to search
3 individual portions based on tags, it had a data loading
4 capability, and it had an order list capability, that all of
5 those things were developed onto the TV/2 system, not as it's
6 described in the 105 and 107, but after that \$600,000, one-year
7 plus project was complete.

8 Q Would you agree that one of ordinary skill reading the
9 Technical Viewer/2 brochure would think it would be obvious to
10 combine a system like the RIMS system described in the '989
11 patent with a searching system like the TV/2 system?

12 A No.

13 Q Well --

14 A Well, for what purpose?

15 Q For the purposes described in the TV/2 brochure.

16 A No, because the RIMS system -- to combine the -- the RIMS
17 system was a requisition and inventory management system. The
18 TV/2 is a search and viewer system. The -- there's nothing in
19 the brochure that suggests combining it with a requisition and
20 inventory management system.

21 I mean, I'd have to look at the purpose, but it doesn't
22 seem obvious to me from the point of view of one of ordinary
23 skill in the art that it would be an obvious thing to combine
24 for the purposes described in that brochure in either of the
25 two brochures.

1 Q Can we turn to the TV/2 brochure, Defendant's Exhibit 107,
2 please. Go to the fourth page of that document. Blow up the
3 column on the left, and specifically let's blow up the third
4 bullet point. And maybe I should -- I don't know if you can
5 read the fine print there. Let's blow up the whole left column
6 so we can see the context. This is a part of the TV/2 brochure
7 that's talking about potential uses; correct?

8 A Yes.

9 Q And the third one is, integrating parts catalogs with
10 dealers' computer systems such as order entry, inventory
11 management, and customer records; right?

12 A Yes.

13 Q Wouldn't you agree, Mr. Hilliard, that someone with a
14 computer science degree and one or two years of experience in
15 working with computer procurement systems reading this bullet
16 point in the TV/2 brochure would understand that it would be a
17 good idea to combine the TV/2 system with an inventory
18 management system like the RIMS system to get the features
19 discussed in this brochure?

20 A What features are you referring to?

21 Q Any of the features that the brochure highlights as
22 benefits of the TV/2 system?

23 A I don't see a feature.

24 Q Well, we've already gone through that brochure, haven't
25 we, a little bit, Mr. Hilliard? You know the brochure talks

1 about some potential benefits of the TV/2 system, don't you?

2 A It talks about -- features are different than benefits. I
3 didn't see any features described.

4 Q I'll rephrase the question.

5 A It talks about potential benefits as -- I don't recall it
6 talking about features.

7 Q Let's talk about benefits then. Would you agree that one
8 of ordinary skill in the art, seeing this paragraph about
9 integrating parts catalogs, would agree that if they had a RIMS
10 system, an inventory management system like RIMS, and they
11 wanted to get the benefits described in this brochure, that it
12 would be an obvious thing to combine a TV/2 system with the
13 RIMS system?

14 A If one had a RIMS system, would it -- well, the only
15 company that had a RIMS system was Fisher, and it wasn't
16 obvious -- Fisher didn't sell the RIMS system to competitors or
17 to customers. They installed the RIMS system in their
18 customers' site.

19 Q I wasn't asking about selling, Mr. Hilliard. I had a very
20 specific question?

21 A You're saying if someone had a RIMS system. So the only
22 one who had a RIMS system was Fisher.

23 Q All right.

24 A Okay.

25 Q But let's make sure we're clear. I'm talking about one of

1 ordinary skill in the art who knew about the RIMS system and
2 was looking at this brochure. Wouldn't they read this and say
3 it's an obvious thing to combine that RIMS system with the TV/2
4 system?

5 A They might look at that and say that it's a possibility to
6 do that. I'm not sure that you'd look at it and say it was
7 obvious to do that. You'd have to -- obvious for what purpose?
8 It's not clear to me for what purpose it would be -- I mean, if
9 you give me a purpose, I can say, well, would it be obvious for
10 that purpose.

11 Q Mr. Hilliard, based on all your investigation for purposes
12 of this case, do you have an understanding as to what the
13 benefits of the TV/2 system were as they were described in the
14 TV/2 literature?

15 A I understand that the claimed benefits are the ability to
16 search and view databases or data on CDs or so forth.

17 Q Things likes catalog that are large volumes of data;
18 right?

19 A Such as that, right.

20 Q And could include images and things likes that?

21 A Yes.

22 Q Using that as the benefits of the TV/2 system, isn't it
23 true that one of ordinary skill back in 1993, April of '93, if
24 they knew about the RIMS system in the '989 patent, they saw
25 this TV/2 brochure, it would be obvious to them, to get the

1 benefits of the TV/2 system, incorporated with that RIMS system
2 by combining the two things together?

3 A I'd love to be able to answer your question, but I'm not
4 sure what benefits you are talking about. The benefits have to
5 be in relation to something, and so -- it's difficult for me to
6 respond to your question -- if you could lay out what benefits
7 we're talking about, I could perhaps answer the question, but
8 in terms of just to combine two systems because they're
9 potentially combinable, unless you know what purpose you would
10 want to do it for, for some purposes it might be obvious and
11 for others it wouldn't.

12 THE COURT: I think we've been through this already
13 once.

14 MR. McDONALD: I was ready to move on.

15 THE COURT: Are you ready? About how close are you?

16 MR. McDONALD: I'm very, very close. In fact, I
17 think I may stop right here.

18 MS. ALBERT: I just have a couple redirect questions,
19 Your Honor.

20 THE COURT: Do you know the most fundamental flaw in
21 redirect?

22 MS. ALBERT: What's that?

23 THE COURT: Opening doors. The most common error
24 made.

25 MS. ALBERT: I understand, Your Honor.

1 THE COURT: Or at least the most common error I made.

2

3 REDIRECT EXAMINATION

4 BY MS. ALBERT:

5 Q Mr. Hilliard, you were directed to this DX-62 that
6 includes the Fisher RIMS brochure at page 32 of DX-62.

7 A Yes.

8 Q Does that brochure provide any details for how the RIMS
9 system is supposed to perform the features that are touted in
10 that brochure?

11 A No. No, no detail at all.

12 Q Does the brochure change -- does the description of the
13 system included in the brochure change any of your opinions as
14 to the functionality that the RIMS system had in the 1993 to
15 1994 time frame?

16 A No, no, it doesn't, because the inventors said that it was
17 not an accurate description of the RIMS system.

18 Q Does the description of the RIMS system included in the
19 brochure change any of your conclusions about whether the RIMS
20 system satisfied any of the elements of the asserted claims?

21 A No.

22 Q Now, you were referenced to the description in the patent
23 of one of the preferred embodiments, and I want to refer to
24 PX-1.

25 You were referenced to the embodiment where the customer

1 service representative is a user of the system, and you
2 indicated that there was another embodiment described where the
3 customer end user is the user of the system. Could I direct
4 your attention to column 16 of PX-1.

5 A Okay.

6 Q And if you look --

7 A 15 did you say?

8 Q Column 16.

9 A 16, okay.

10 Q And if you refer to the paragraph starting at line 40, do
11 you see the first sentence of that paragraph says, in some
12 embodiments, a customer end user or a customer purchasing
13 employee operating REQI program 44A of the Fisher RIMS system
14 40 may also operate TV/2 search program? Do you see that?

15 A Yes.

16 Q Is that the beginning of the description that you
17 referenced that refers to the customer end user being able to
18 use the electronic sourcing systems of the claims?

19 A That's one of them, yes.

20 Q Now, directing your attention to DX-107, the TV/2
21 marketing brochure, and going back to that page four that Mr.
22 McDonald referenced, from a review of the bullet that Mr.
23 McDonald referred you to about integrating parts catalogs with
24 dealers's computer systems such as order entry, inventory
25 management, and customer records, would it be obvious based on

1 that description in this brochure to combine the RIMS system as
2 described in the '989 patent with the TV/2 program as it
3 existed prior to 1994 to implement a system having the elements
4 of any of the patent claims at issue here?

5 A No. For that purpose, it wouldn't be obvious.

6 MS. ALBERT: Thank you. No further questions.

7 THE COURT: Can he be excused permanently?

8 MR. ROBERTSON: Yes, Your Honor.

9 MR. McDONALD: Yes, Your Honor.

10 THE COURT: All right. Thank you, Mr. Hilliard, for
11 being with us and giving us your evidence.

12 MR. ROBERTSON: Plaintiff rests, Your Honor.

13 THE COURT: Plaintiff rests. Ladies and gentlemen,
14 the evidence in this case is now closed. What does that mean
15 to us now? I have to do some things with the lawyers tomorrow.
16 It probably will take three to four hours to finish that
17 process.

18 It seems to me that it would maybe be a better --
19 because I have found that in this case my estimates have not
20 always been as good as I thought they would be. I think it
21 might be a better use of your time for you to take off
22 tomorrow, come back Monday. They'll be ready to argue the
23 case. They'll start off Monday morning, argue the case. I'll
24 give you the instructions, and then you can retire to
25 deliberate.

1 I think that in the overall scheme of things, your
2 time will be better served by allowing us to do what we need to
3 do tomorrow. So if you will just be here at nine o'clock on
4 Monday morning, we'll take -- we'll finish up the case. All
5 the evidence is now in. Have a nice weekend. Remember not to
6 discuss the matter with anybody. I don't want you -- and don't
7 go out and try to build any procurement systems or anything
8 like that. Just leave your books. Mr. Neal will take care of
9 them. Thank you. Drive carefully.

10
11 (Jury out.)
12

13 THE COURT: All right, our task for tomorrow is to
14 hear the arguments on JMOL and to -- JMOLs, and to make sure we
15 have the jury instructions and the verdict forms correct. I
16 estimate that if we get started about 9 o'clock, that we can be
17 finished, and I have told the people for the preliminary
18 injunction, temporary restraining order to be here, and I'll
19 start with them at two o'clock. So I figure by noon we ought
20 to be out of here. I certainly hope so.

21 MS. HUGHEY: Your Honor, before we close out the day,
22 I, just for the record, would like to move for judgment as a
23 matter of law on the issue of invalidity now that the plaintiff
24 has been fully heard, just to preserve the issue. I understand
25 we're going to argue tomorrow. Would that be all right?

1 THE COURT: All right, you've made your motion. We
2 need -- also, I have to clean up what to do about Court
3 Exhibit 4 which was that last question that we got, and I need
4 to give a proper instruction on this opinion of counsel
5 question as well. I told you what I'm going to do, but I need
6 to -- I haven't put it into the jury question -- I mean the
7 jury instructions, and then -- I will. Somebody sent back an
8 instruction. Who did that?

9 MR. ROBERTSON: That was the plaintiff, Your Honor.
10 Here's what --

11 THE COURT: Do you have an instruction gremlin back
12 at the hotel, or is that you?

13 MR. ROBERTSON: No, Your Honor, but I might make a
14 suggestion. If those slides that I found objectionable that,
15 in my view, suggested that Court somehow through the
16 construction for the means plus function claims was suggesting
17 a combination between TV/2 and RIMS was appropriate, if those
18 slides aren't used in the closing arguments, then I think
19 putting any undue emphasis, even with a curative instruction,
20 would do more harm than that good. So if I can agreement from
21 Mr. McDonald that those slides wouldn't be used in closing,
22 then I think the problem would be solved.

23 MR. McDONALD: I have to know exactly what he is
24 talking about.

25 MR. ROBERTSON: They were the slides that

1 incorporated the Court's construction that were used by Dr.
2 Shamos on his obviousness opinions, and I think the suggestion
3 was being made, because the Judge was looking in some instances
4 at TV/2 as performing a search function among other structures,
5 that the implication was left that that would therefore warrant
6 the jurors concluding that TV/2 and RIMS would be combined by
7 cloaking it in the guise of the Court's construction.

8 We thought that was just inappropriate, so I wanted a
9 curative instruction. Your Honor actually suggested that I
10 prepare one for you. So that was actually the genesis of that.

11 THE COURT: I said if you wanted one. I wasn't out
12 fishing trolling for a free hit.

13 MR. ROBERTSON: I made a proposal that would permit
14 that Your Honor would not have to address that if I can get Mr.
15 McDonald's agreement.

16 THE COURT: Why don't you look at it and look --

17 MR. McDONALD: I'll look at it overnight and talk to
18 Mr. Robertson first thing in the morning and see if we can work
19 that out earlier.

20 THE COURT: Okay. Nine o'clock. Now, let me ask you
21 something, are you all using demonstratives in your closing
22 arguments?

23 MR. ROBERTSON: Yes, Your Honor, plaintiff is.

24 MR. McDONALD: I'm sorry, what was the question?

25 THE COURT: Are you going to use demonstratives in

1 your closing arguments.

2 MR. McDONALD: I would expect that.

3 THE COURT: I don't want any problems on Monday
4 morning, so I want you all to show those demonstratives to each
5 other. Are they ready now?

6 MR. ROBERTSON: I would suggest we schedule a meeting
7 sometime together Sunday and iron it all out.

8 MR. McDONALD: I think we can try to come up with a
9 time to exchange, maybe Sunday morning, 9:00 a.m.

10 THE COURT: All right. That's fine. Okay. That's
11 it then, is it? All right. We'll be in adjournment.

12

13 (Court adjourned.)

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